

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

July 20, 2005

IN RE:

PETITION OF DIECA COMMUNICATIONS, INC.
D/B/A COVAD COMMUNICATIONS COMPANY,
FOR ARBITRATION OF INTERCONNECTION
AGREEMENT AMENDMENT WITH BELL SOUTH

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DOCKET NO.
04-00186

ORDER

This matter came before Chairman Pat Miller, Director Deborah Taylor Tate and Director Sara Kyle of the Tennessee Regulatory Authority (the "Authority" or "TRA"), the voting panel assigned to this Docket, at a regularly scheduled Authority Conference held on September 27, 2004 for consideration of the *Petition for Arbitration of DIECA Communications, Inc.* ("Petition") filed by DIECA Communications, Inc., d/b/a Covad Communications Company ("Covad"). Covad requests that the TRA resolve one open issue resulting from the interconnection agreement negotiations between Covad and BellSouth Telecommunications, Inc. ("BellSouth") (collectively, the "Parties").

BACKGROUND

On December 4, 2003, BellSouth provided Covad with proposed amendments to the Parties' Interconnection Agreement ("Agreement"), which were related to the *Triennial Review Order* ("TRO")¹ issued by the Federal Communications Commission ("FCC"), pursuant to the

¹ *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98, 98-147, (Report and Order and Order on Remand and Further Notice of Proposed Rulemaking) 18 F.C.C.R. 16,978 (August 21, 2003), corrected by Errata, 18 F.C.C.R. 19020 (2003)(hereinafter "Triennial Review Order" or "TRO").

Agreement's change of law provision. Covad asserted that some of the proposed amendments were not related to the TRO and further, that some were affected by the decision of the United States Court of Appeals, District of Columbia Circuit in *United States Telecom Ass'n v. FCC* ("*USTA II*").² Covad maintained that the only issue in this proceeding that was not affected by *USTA II* is the line sharing issue.

BellSouth responded to Covad's *Petition* on July 19, 2004 and asserted that the *Petition* was a dispute rather than an arbitration and should be converted accordingly. BellSouth also asserted that the TRO clearly set forth the manner in which BellSouth was obligated to provide line sharing, and thus, there was nothing for the TRA to address regarding this issue. BellSouth maintained that there were other aspects of the TRO not reversed by *USTA II* that must be incorporated into the Parties' Agreement and that should be resolved as part of this proceeding. On July 28, 2004, BellSouth filed its *Motion for Summary Disposition and Expedited Relief* asserting that, "[t]his case is ideal for an expedited, summary disposition on a paper record without a hearing."³ BellSouth requested that the Authority enter an immediate procedural and scheduling order setting dates for (1) the submission of initial briefs on the merits; (2) the submission of reply briefs and proposed orders; and (3) a full Authority decision.

During a regularly scheduled Authority Conference held on August 9, 2004, the panel appointed General Counsel or his designee as Hearing Officer for the purpose of determining whether this matter should proceed as an arbitration or a dispute and, if determined to be a dispute, to establish procedures for resolution of the docket and resolve any other matters necessary to the preparation of this docket for a hearing before the panel.

The Parties filed a joint letter with the Hearing Officer on August 12, 2004 reporting that they had resolved five of the original issues of the *Petition* and were discussing four other issues.

² 359 F.3d 554 (D.C. Cir. 2004), *cert. denied*, 125 S.Ct. 313, 316, 345 (2004) ("*USTA II*")

³ *Motion for Summary Disposition and Expedited Relief*, p. 1 (July 28, 2004)

BellSouth and Covad also requested that the Authority or Hearing Officer order the Parties to file legal briefs on or before September 3, 2004 addressing the following limited issue: *Is BellSouth obligated to provide Covad access to line sharing after October 2004?*⁴ Pending a decision on the foregoing legal question, the Parties agreed to hold all other issues and outstanding motions in abeyance, based on the assumption that the determination of this issue would facilitate an expedited decision in this matter.

On August 17, 2004, the Hearing Officer notified the Parties that, based on the delegation of authority, the Parties' August 12, 2004 letter requesting a briefing schedule could be addressed only if this proceeding is determined to be a "dispute" rather than a petition for arbitration.⁵ Otherwise, the Parties' joint request for a briefing schedule must be considered by the voting panel. Therefore, the Hearing Officer asked the Parties to file a clarification as to whether they were in agreement that this proceeding should be addressed as a petition for dispute resolution or a petition for arbitration.

In a letter dated August 19, 2004, the Parties responded to the Hearing Officer's request stating, that they had conferred and could not agree whether this proceeding is a change of law dispute resolution or an arbitration.⁶ The Parties further requested that the Authority approve the proposed procedural schedule during the August 30, 2004 Authority Conference. At a regularly scheduled Authority Conference held on August 30, 2004, the panel voted to direct the Hearing Officer to set September 3, 2004 as the briefing schedule for the line sharing issue and to hold the remainder of the issues in abeyance. The Hearing Officer issued the *Order Establishing Briefing Schedule* on August 31, 2004.

⁴ See Letter Advising the TRA that Covad and BellSouth Have Met and Discussed the Issues in this Case, p 1 (August 12, 2004)

⁵ See Letter to Parties from Hearing Officer Stone (August 17, 2004)

⁶ See Letter from Parties to Hearing Officer Stone (August 19, 2004)

POSITIONS OF THE PARTIES

In its brief filed September 3, 2004,⁷ Covad asserts that BellSouth's obligation to provide access to line sharing is grounded in two undisputed facts: 1) Line sharing is a checklist item 4 loop transmission facility; and 2) Regional Bell Operating Companies ("RBOCs"), like BellSouth, offering long distance services pursuant to Section 271 of the Telecommunications Act ("Section 271"), have an obligation to provide checklist item 4 loop transmission facilities irrespective of unbundling determinations under Section 251 of the Telecommunications Act ("Section 251").⁸

BellSouth asserts in its brief that the question before the Authority focuses on the legal obligation concerning access to line sharing which is addressed by the FCC in rules binding on the TRA and that there is no reason to consider Covad's Section 271 argument.⁹

BellSouth relies on the requirements contained in the TRO and Section 251, while Covad contends that Section 271 requirements should be considered, to resolve this issue. In response to Covad's Petition filed with the North Carolina Utilities Commission (Docket No. P-775, Sub 8), the Public Staff stated,

[T]he Commission's determination of this issue should reflect that BellSouth has a Section 251 obligation to provide line sharing to existing customers on a grandfathered and transitional basis as well as an on-going Section 271 obligation to make line sharing available to new customers of CLPs [competing local providers] on and after October 2, 2004.¹⁰

The North Carolina Commission has not yet ruled on this matter.¹¹ Also, in Covad's Petition to the Louisiana Public Service Commission (Docket No. U-28027), the staff concluded that

⁷ *Brief of Covad Communications Company* (September 3, 2004)

⁸ *See Brief of Covad Communications Company*, p. 1 (September 3, 2004)

⁹ *See BellSouth's Brief in Support of Proposed Interconnection Agreement Amendment* (September 3, 2004)

¹⁰ *In the Matter of Petition of DIECA Communications Company for Arbitration of Interconnection Agreement Amendment with BellSouth Telecommunications, Inc Pursuant to Section 252(b) of the Telecommunications Act of 1996*, Docket No. P-775, Sub 8, Public Staff Comments on Line Sharing, ¶ 16 (September 10, 2004).

¹¹ On October 29, 2004, the North Carolina Public Service Commission issued an order in which it declined to decide whether BellSouth is obligated to provide line sharing after October 2004. It stated that the effect of the ruling was that BellSouth must provide line sharing to existing customers under the FCC's transition plan, but there is no present requirement to provide line sharing to new customers. *See DIECA Arbitration of Interconnection Amendment*, Docket No. P-775, Sub 8, Order Concerning Line Sharing (October 29, 2004)

BellSouth has a continuing obligation to provide line sharing, in accordance with its grant of Section 271 authority.¹² The Louisiana Commission has not yet ruled in this docket.¹³

DISCUSSION

In its promulgation of the initial line sharing rules,¹⁴ the FCC affirmed that local exchange carriers (“LECs”) must unbundle the high frequency portion of the local loop (“HFPL”) pursuant to Section 251(c)(3).¹⁵ Subsequently, the FCC issued the TRO on August 21, 2003. This Order clearly focused on the “all potential revenues derived from using the full functionality of the loop.”¹⁶ Proceeding with this focus, the FCC found that there are numerous services that may be provided over a stand-alone loop, including voice, data, video and voice over digital subscriber line (“DSL”). The FCC noted, using one of the petitioners in this case (Covad) as an example, that competitive local exchange carriers (“CLECs”) are capable of offering the HFPL through line splitting with other competitive carriers.¹⁷ The FCC found “that allowing competitive LECs unbundled access to the whole loop and to line splitting but not requiring the HFPL to be separately unbundled creates better competitive incentives than the alternatives.”¹⁸ Nevertheless, the FCC allowed requesting telecommunications carriers who obtained line sharing arrangements prior to the effective date of the TRO to continue to receive access to those arrangements at the same rate the incumbent LEC charged for such access prior

¹² *In re Petition for Arbitration of Interconnection Agreement Amendment with BellSouth Telecommunications, Inc pursuant to Section 252(b) of the Telecommunications Act of 1996*, Docket No U-28027, Final Recommendation of the Administrative Law Judge, p 13 (September 28, 2004)

¹³ On January 13, 2005, the Louisiana Public Service Commission issued an order stating that Bellsouth had a continuing obligation to provide line sharing under Section 271 unless BellSouth’s Petition For Forbearance is granted. *See In re Petition for Arbitration*, Docket No U-28027, Order, (January 13, 2005)

¹⁴ *In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket Nos 98-147 and 96-98, (*Local Competition Fourth Report and Order, Advanced Services Third Report and Order*) 14 F.C.C.R. 20912, ¶¶ 15-18 (December 9, 1999) (“Line Sharing Order”)

¹⁵ In *USTA II*, the Court remanded line sharing for the FCC’s failure to consider the relevance of competition in broadband services coming from cable (and to a lesser extent from a satellite) However, the Court upheld the FCC’s determination that a portion of the spectrum of a loop qualified as a network element

¹⁶ *Triennial Review Order* at ¶ 258

¹⁷ *Id.* at ¶ 259

¹⁸ *Id.* at ¶ 260

to the TRO until the end user cancels or discontinues the DSL service of the requesting telecommunications carrier.¹⁹ The FCC also initiated a three-year transition period to phase out line sharing as a separate network element.²⁰ In year one, competitive carriers may obtain access to the high frequency portion (“HFP”) of a copper loop at a cost of 25% of the state approved monthly recurring rate or 25% of the recurring rate for stand alone copper loops in the existing interconnection agreement. During year two, competitive carriers may access the HFP of a copper loop at 50% of the state approved recurring rate or 50% of the recurring rate for stand alone copper loops in the interconnection agreement. During year three, competitive carriers may access the HFP of a copper loop at 75% of the state approved recurring rate or 75% of the recurring rate for stand alone copper loops in the interconnection agreement.²¹ Upon completion of the three-year transition period, any new customers must be served through a line splitting arrangement.²² Customers that existed prior to the effective date of the TRO are grandfathered until commencement of the FCC’s Biennial review in 2004 and competitive carriers are charged the same price as they were charged on the effective date of the TRO. These customers are grandfathered until xDSL service is discontinued.

The TRO specifically states that the transition period was adopted in order to ensure that carriers had time to make necessary changes and negotiate new agreements with incumbent local exchange carriers (“ILECs”) for new line sharing arrangements.²³ Further, it is apparent from the summaries of the dissents provided in footnote 783 of the TRO “...a three-year transition period for the elimination of line sharing” and “[t]he decision to kill off this element and replace it with a transition of higher wholesale prices...” that the FCC removed line sharing as an unbundled network element for new customers after October 2004.

¹⁹ *Id* at ¶ 264

²⁰ The FCC rules regarding line sharing were upheld by the Court in *USTA II*.

²¹ *Id* at ¶ 265

²² *Id*

²³ *Id* at ¶ 264

The panel recognized that BellSouth filed a Petition for Forbearance with the FCC.²⁴ Additionally, in light of the Authority's decision in the BellSouth/ITC^DeltaCom Arbitration²⁵ setting a rate for a Section 271 element, BellSouth filed a *Petition for Declaratory Ruling and Preemption of State Action*.²⁶ The decision rendered in both of these dockets will provide clarification regarding state authority to designate network elements that must be unbundled and the setting of rates for 271 elements.

SEPTEMBER 27, 2004 AUTHORITY CONFERENCE

At the regularly scheduled Authority Conference held on September 27, 2004, Covad represented that the parties had procedurally agreed to ask this Authority if line sharing must be provided by BellSouth pursuant to Section 271. Chairman Miller noted that this representation was a "recharacteriz[ation] of the question." The issue before the panel is whether BellSouth is required to provide line sharing after October 2004 pursuant to 47 U.S.C. § 251(c)(3).

Upon consideration of the FCC's findings in the TRO and the two dockets pending with the FCC,²⁷ the panel found that BellSouth is obligated to continue providing line sharing after October 2004 pursuant to 47 U.S.C. § 251(c)(3) as outlined in the FCC's TRO and 47 C.F.R. § 51.319.

IT IS THEREFORE ORDERED THAT:

1. BellSouth shall continue to provide line sharing after October 2004 pursuant to 47 U.S.C. § 251(c)(3) as outlined in the FCC's Triennial Review Order and 47 C.F.R. § 51.319.

²⁴ *In the Matter of BellSouth Telecommunications, Inc.*, WC 04-48 (*Petition for Forbearance under 47 U.S.C. Section 160(c)*) (March 1, 2004)

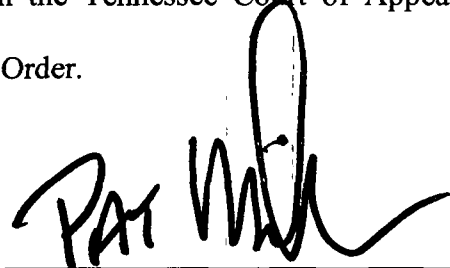
²⁵ *See In Re Petition For Arbitration Of ITC Deltacom Communications, Inc. with BellSouth Telecommunications, Inc.*, Docket No. 03-00119

²⁶ *In the Matter of BellSouth Emergency Petition for Declaratory Rule and Preemption of State Action*, WC 04-245 (July 1, 2001)

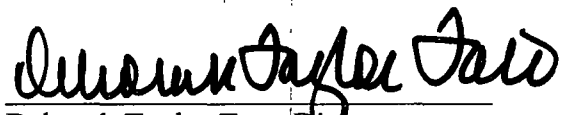
²⁷ *In the Matter of BellSouth Emergency Petition for Declaratory Rule and Preemption of State Action*, WC 04-245 (July 1, 2001), *In the Matter of BellSouth Telecommunications, Inc.*, WC 04-48 (*Petition for Forbearance under 47 U.S.C. Section 160(c)*) (March 1, 2004)

2. Any party aggrieved with the Authority's decision in this matter may file a Petition for Reconsideration with the Authority within fifteen (15) days from the date of this Order.

3. Any party aggrieved with the Authority's decision in this matter has the right of judicial review by filing a Petition for Review in the Tennessee Court of Appeals, Middle Section, within sixty (60) days from the date of this Order.

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Pat Miller, Chairman

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Deborah Taylor Tate, Director

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Sara Kyle, Director